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No. 94 - 1930

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

v.

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

**On Petition For A Writ of Certiorari To
The United States Court of Appeals For the Ninth Circuit**

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF RESPONDENT DANIEL E. LUNGREN

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July 7, 1995

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QUESTION PRESENTED

Whether a state legislature can define terms used to advertise products--"ozone friendly," "biodegradable," "photodegradable" and "recycled"--which have no common, agreed upon meaning so as to prevent deceptive advertising and foster environmental protection goals by requiring all advertisers who choose to use one of the defined terms when selling a consumer product to mean the same thing.

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No. 94 - 1930

In The
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October Term, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

v.

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

**On Petition For A Writ of Certiorari To
The United States Court of Appeals For the Ninth Circuit**

**BRIEF IN OPPOSITION OF RESPONDENT
DANIEL E. LUNGREN, ATTORNEY GENERAL OF CALIFORNIA**

Respondent Daniel E. Lungren, Attorney General of the State of California, respectfully requests that this Court deny the Petition for Writ of Certiorari since the Ninth Circuit Court of Appeals and the district court both correctly decided this matter. The Court of Appeals

decision is reported at 44 F.3d 726 and is reprinted in Petitioners' Appendix at 1a-33a.[1/]

STATEMENT OF THE CASE

This case asks the following question: can a state legislature, which finds the marketplace being filled with a growing number of advertisements using meaningless environmental "buzz" words to sell consumer goods, act to protect the public and foster its environmental goals by adopting legislation which defines such terms, so that when an environmental claim using one of the defined terms is made in an attempt to sell products, the public will know that such claim is not deceptive and that products so advertised meet the threshold definition and, therefore, are at least more environmentally benign than products which cannot so advertise? To accomplish this purpose, the California Legislature adopted §17508.5 which, rather than banning the use of such ambiguous words, defined them and required that all manufacturers and distributors of consumer products, whether "ecologically oriented" or not and whether "non-profit" or "for profit," who wish to use such words when advertising the environmental attributes of their consumer products meet the definitional requirements.

The Court of Appeals for the Ninth Circuit, based upon the completeness of the record before it, agreed with the district court, and properly answered that a state legislature can so act. The courts below fully considered and correctly decided the issues presented in this matter, properly applied the requirements of this Court and, thus,

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1. Further cites to documents reprinted in the Appendix attached to petitioners' Petition for Writ of Certiorari ("Petition") shall be referenced as "Pet. App. (page)."

there simply is no error which would require the Court to grant the Petition for Writ of Certiorari.

A. Factual Background of This Action

1. What the Statute Does

Section 17508.5 of the California Business and Professions Code (reprinted in the Respondent's Appendix ("Ra") hereto at 1Ra-2Ra) does no more than countless other statutes on the state and federal level do--it gives meaning to ambiguous terms by defining them. Many federal statutes define terms *and* require that such terms be used in advertisements to the public.[2/] Similar to laws such as the Federal Food, Drug and Cosmetic Act, which was amended by the Nutrition Labeling and Education Act of 1990,[3/] California Business and Professions Code §17508.5 does not require advertisers to use any prescribed terms, but only requires that if manufacturers or distributors of consumer goods choose to make environmental attribute claims for their products by use of the terms defined in the statute, then the statutory definition of the terms must be met. Through laws such as

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2. *See, e.g.*, 15 U.S.C. 1606, 12 C.F.R. 226, et seq., which defines terms such as "finance charge" and "Annual Percentage Rate" and requires the latter's use in advertisements for loans; 15 U.S.C. 2800, et seq., 16 C.F.R. 306, which defines how one determines "Octane Rating" and establishes when it is to be used in certain advertisements for gasoline; and 15 U.S.C. 2000, et seq., 40 C.F.R. 600, et seq., which defines "fuel economy" and establishes when the term must be used in advertisements for automobiles.

3. Pub. L. No. 101-535, 104 Stat. 2353 (1990) and 21 C.F.R. 101 which includes definitions of terms such as "low fat," "light," and "high fiber"; *see, also,* cases cited in the Court of Appeals's decision, Pet. App. page 20a, n.3.

these, Congress and the states have long required that all advertisers who make claims about their products mean the same thing when using the same term.

That is what the California Legislature did when it adopted §17508.5 and defined the terms "ozone friendly," "biodegradable," "photodegradable," and "recycled." By giving these terms, which, petitioners' assertions notwithstanding, have no commonly accepted definition, a uniform definition, and requiring that a manufacturer or distributor who wishes to use such terms in its advertisements use the terms in a way which meets the statutory definition, the legislature did no more than ensure that the "stream of commercial information [about the claimed environmental attributes of consumer products] flows cleanly as well as freely." *Virginia State Board of Pharmacy v. Virginia Citizens Council,* 425 U.S. 748, 771-772 (1976) (brackets added); Court of Appeal decision, Pet. App. 19a. In our economy, it is essential that commercial advertising must flow truthfully to protect consumers who buy products because of an advertised attribute and to protect the legitimate business person from unfair competition committed by those who would use "catch phrases" or the latest "buzz" words in a deceptive manner.

The Court of Appeals's opinion correctly affirmed the district court's holding that "the environmental advertisements in question are at least potentially misleading to the public and therefore some form of regulation is justified." Pet. App. 14a. The reason for this is two-fold: first, the terms defined in §17508.5 are not common terms with common definitions; and, second, "circumstantial factors objectively ascertainable, with some difficulty, by the consumer," are needed to be known in order to test the veracity of the advertising claim made for the product. Pet. App. 14a-15a. Thus, the court below correctly concluded that "In the less favorable

circumstances prevailing in many areas of California, use of these terms could well be misleading." *Id.* The Ninth Circuit's decision was based on the completeness of the record herein which conclusively shows that such terms are "potentially misleading," i.e., they have the capacity to mislead the public.[4/]

Since consumers can neither easily verify the accuracy of the environmental claim made by manufacturers or distributors in advertisements for their products, nor compare the environmental attributes of various products if advertisers are using the same terms but each advertiser means something different when using the same term, the California Legislature to prevent fraud and deception could, without violating the First Amendment, require that manufacturers and distributors who wish to

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4. *See,* Joint Stipulation of Facts ("JS") reproduced at Pet. App. 70a-91a, specifically ¶23 (at 79a), ¶28-29 (at 81a), ¶39-41 (at 85a-86a) and ¶48-49 (at 87a); note 4, *infra*; and, EPA, "Evaluation of Environmental Marketing Terms in the United States," (EPA 741R-92-003), February, 1993, of which portions of pages i-iv of the Executive Summary are reprinted at 3Ra-12Ra, and pages 77-85 of this EPA Report. In these latter pages, the EPA details 49 cases brought by state Attorneys General, the FTC, local Departments of Consumer Affairs and the Better Business Bureau's National Advertising Division, against manufacturers and distributors because of the allegedly deceptive use of environmental claims in advertising and on labels. Settlements of these matters were announced between October 1990 and July 1992, although the investigations began before these dates. Of these actions, approximately 35 involved allegations that the words "degradable," "recycled" or "ozone friendly" or a variation of them (i.e., "photodegradable," "ozone safe," etc.) were used in a deceptive and misleading manner. These cited portions of the record all show that, unlike petitioners' assertion that there is only one piece of evidence to support the legislature's conclusion that the regulated words were potentially misleading (Petition at 20), there are many bases to support the conclusion by the legislature that these words had been used in a deceptive manner.

make environmental claims for their consumer products mean the same thing when they use the same words. In this way, the legislature sought to ensure that the marketplace was free from deception, that advertisers whose products positively benefitted the environment could so advertise the environmental benefits of their products and that consumers interested in buying products with certain environmental attributes could purchase these products and know that they could trust the truthfulness of the claims made for these products. The petitioners are seeking a Writ of Certiorari simply because they do not like the Court of Appeals's decision, not because of any errors made by that court.[5/]

2. The Scope of the Statute

Since this matter arises on a facial challenge to the statute, it must be borne in mind that the only "advertisements" before the courts below were those that the petitioners chose to bring to the attention of the

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5. The Ninth Circuit finding that the harm was real, and that the district court correctly also found that the harm was real, was based upon the substantial evidence in the record to support this conclusion. If there is question about this, Respondent Lungren respectfully addresses the Court's attention to the numerous items in the record which are also cited: at pages 6-13, 34-35, and 40-42 of Defendant-Appellee Lungren's Brief On Appeal; at pages 2-5, 18-20, 23-25 and 33-36 of Intervenors-Appellees Californians Against Waste and The Environmental Defense Fund's Brief On Appeal; the Joint Stipulation of Facts of Defendant Lungren and Plaintiffs Association of National Advertisers, et al. and the 30 exhibits thereto; the 281 page Joint Supplemental Excerpts of Record of Appellees Daniel Lungren and Californians Against Waste and The Environmental Defense Fund ("SER"); the 249 page Excerpts of Record of Plaintiffs-Appellants Association of National Advertisers, et al. ("ER"); and, at pages 3-7, 21-22 and 27-28 of Brief on Appeal of Amici Curiae California Resource Recovery Association, et al. *See also*, note 3, *supra.*

courts--assumedly the "worst case scenarios" for the statute. Contrary to petitioners' assertions at pages 5-7 of their Petition, nothing in the statutory language, as it was written by the legislature and correctly interpreted by the lower courts, prevents petitioners' members from telling the whole world that "Del Monte supports steel can recycling" or that "The 'tin' can may just be the world's perfect container" or even that "This watch is a piece of junk." Such advertisements are not representations about consumer goods the manufacturer or distributor is trying to sell through the use of one of the defined terms of §17508.5. As such, the statute has no application to such statements.[6/]

Any "chilling effect" the petitioners claim the statute has comes from their own tortured reading of the statute and not from either the plain language of the statute or the Court of Appeals's interpretation of it. If petitioners were to apply the court's ruling to their future advertising, they would know exactly what advertising §17508.5 covers and what it does not cover. In short, the statute in no way touches upon those types of expression traditionally entitled to complete First Amendment protection. The permissible limits set on commercial speech by §17508.5 contrast with violative restrictions placed on noncommercial speech because §17508.5 does not "penalize the expression of particular points of view and force speakers to alter their

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6. Neither Respondent Attorney General Lungren nor any other California law enforcement office has sought to enforce the statute by bringing any action alleging a violation of §17508.5, nor has he told any petitioner or any member of any petitioner association that he intends to bring such an action against any of them. JS ¶57; Pet. App. 90a. Thus, as set forth in JS ¶35 and ¶37, Pet. App. 83a-85a, neither of the companies who claim to have ceased their advertisements because of §17508.5's adoption (Petition 6-7), were ever told that these advertisements violated §17508.5.

speech to conform with an agenda they do not set." *Pacific Gas and Electric Co. v. Public Utilities Comm. of California*, 475 U.S. 1, 9 (1986).

B. The Environmental Advertising Milieu Prior to Adoption of Section 17508.5

"NEW! DEGRADABLE!"

"MAXIMUM DEGRADABILITY"

"OZONE SAFE"

"ENVIRONMENTALLY DEGRADABLE"

"RECYCLED"

Beginning in the late 1980's, these and other environmental claims for consumer products were hurled at consumers in advertisements and on product labels throughout the country. Marketers had discovered that consumers were interested in the "environmental revolution" and products which helped them play a role in improving their environment. "Green Marketing"--the touting of claimed environmental attributes for consumer products--came of age.

> "'Green Marketing' has become the marketing craze of the 1990's. The American public is increasingly concerned about environmental issues, and people are looking for ways to do their part . . . . The increasing interest in the environmental consequences of purchasing decisions has not been lost on the business community. . . . Many companies have begun claiming that their products provide some benefit to the environment . . . . Unfortunately, attempts to take advantage of

> consumer interest in the environment have led to a growing number of environmental claims that are trivial, confusing or even misleading.
>
> ". . .
>
> "Business has been quick to respond to this growing consumer interest in 'environmentally safe' products. In the past year, American businesses have advertised hundreds of products as 'degradable,' 'recyclable,' 'recycled,' 'ozone friendly' or otherwise good for the environment, and even more new 'environmentally friendly' products are on corporate drawing boards. A survey . . . indicated that some 5,700 new 'green' packaged goods would be introduced in 1989 alone. "Luring Green Consumers: Companies Pursue the Ecology Minded Shopper," *N. Y. Times*, August 6, 1989, at §3, p.12." The Green Report,[7/] SER 15, 19.

Not surprisingly, as this type of advertising grew nationally, the amount of environmental product advertising in California also increased during the years preceding the passage of §17508.5. The problem, however, was that

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7. Because of the increased problems engendered by the use of deceptive environmental advertising claims, an ad hoc group of state attorneys general formed in November, 1989 and held a first set of public hearings in St. Paul, Minnesota in March, 1990. Approximately 40 individuals from industry, consumer and environmental groups and government testified and almost 100 such groups were in attendance. Based on the testimony at these hearings and written submissions received by the group, the ad hoc attorney general group issued a report entitled "The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising," November 1990 ("The Green Report"). This report is attached to the Joint Stipulation of Facts as Exhibit 10 and to the SER at pages 12-83.

contrary to the petitioners' assertion that these terms of environmental advertising have a common ordinarily understood meaning, Petition 3, they simply do not. The record in this case shows that the terms used in these environmental advertisements and on labels were used differently by different advertisers. JS ¶23; Pet. App. 79a. Not all advertisers meant the same thing when they labeled their products "photodegradable" or "recycled" or "ozone friendly."

> "Both environmental groups and business representatives noted the growing confusion surrounding many environmental marketing claims and stated their belief that such confusion was fertile ground for abusive practices. Three reasons were consistently given for the growing confusion. First, the words commonly used in environmental marketing, such as 'environmentally friendly,' 'degradable,' 'recyclable,' and 'ozone friendly' have no clear, uniform meaning. . . ." The Green Report, SER 27.[8/]

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8. The Green Report also indicated that adoption of non-deceptive standardized definitions was particularly important in that:

> "consumers have become increasingly willing to change their purchasing habits in ways that will reduce environmental problems: consumers have begun to seek out products they believe are better for the environment and to avoid products they believe contribute to environmental problems. Several polls and surveys document this trend. . . . "Consumers Go Green," *Advertising Age*, September 25, 1989, at 3. 2/
>
> "Note 2:
>
> More recent polls and surveys report similar findings. A nationwide survey . . . found that 78% of all respondents would pay up to 5% more for

There can be no doubt that in California and nationally there was confusion as to the meaning of the words used to advertise the claimed environmental benefits of advertisers' products.[9] Because of this, the more enlightened in the business community knew that environmental product claims made by manufacturers and retailers should be made with care. For example, in February 1991, the National Food Processors Association ("NFPA"), The Association of National Advertisers, Inc. ("ANA"), Grocery Manufactures of America, Inc. ("GMA"), and The American Association of Advertising Agencies ("AAAA"), all of whom are plaintiffs in this action and petitioners herein, filed a petition with the Federal Trade Commission ("FTC") calling upon the FTC to adopt "Industry Guides for Environmental Claims Under Section 5 of the Federal Trade Commission Act."[10] In the preamble to this petition these plaintiffs state, *inter alia*:

> "As discussed below, industry members, state Attorneys General, and others who are concerned

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> 'environmentally sound' containers and 47% would pay up to 15% more. . . .In a July 1990 poll conducted by the Roper Organization, consumers reported that they would pay an average of 6.6% more for environmentally sound products. Env't Rep. (BNA) at 691 (Aug. 3, 1990.)" [End Note 2.]

The Green Report, SER 19-20.

9. *See*, Gardner, "How Green Were My Values: Regulation of Environmental Marketing Claims," 23 Univ. of Toledo L. Rev. 31, 45-52 (Fall, 1991) and Grodsky, "Certified Green: The Law and Future of Environmental Labelling," Yale Journal on Reguation, Vol. 10 No. 3, 147-227, 150-151 (Winter, 1993).

10. A copy of that petition can be found at ER 68-95.

that claims in this area be truthful and nondeceptive have urged that the Commission issue such Guides. . . .

"Despite the numerous benefits that flow from truthful environmental claims, there is a reluctance on the part of many members of industry to make such claims. This reluctance stems, in part, from the absence of available guidance regarding the interpretation regulators are likely to place upon various statements of environmental benefit. . . .

"At the same time, there may be firms that are willing to take advantage of the absence of clear rules for environmental marketing by making claims that are unsubstantiated or otherwise deceptive. Presumably such firms could become the subject of Federal Trade Commission investigations, but neither the Commission nor the states is in a position to police all such claims. . . .

"At a time when environmental concerns have reached new heights, there is a great risk of deceptive practices." ER 68-71.

Other petitioners have also publicly acknowledged the need for definitions to provide meaning to these terms.

"API believes that some form of standardized definitions and guidelines should be developed to provide meaning to environmental terms used in product advertising and labeling. . . . we believe there is, in all probability, a strong government role required." American Paper Institute (since this litigation began, API has changed its name to American Forest & Paper Association), SER 7.

Possibly these positions recognizing the need for some uniformity to prevent deception and confusion were taken by some of the petitioners[11] and other business people because consumer surveys showed the existence of this confusion among the public at large. *See, e.g.*, "Consumer Purchasing Behavior and the Environment," Abt Associates, SER 195, 200. For instance, although businesses use the term "recycled" to mean many things,[12] it is not unusual for consumers to believe that the term "recycled" when used on a product's label means that the product has been made from other products which have previously been used by consumers, thrown away by those consumers and remade into new products. *See, e.g.*, The Green Report, SER 32-33 and 50; EDF Testimony, SER 219, text and note 12; Cude Testimony, SER 278-280; and the EPA Report, EPA 741R-92-003, wherein at 9Ra, the authors indicate that: "Several factors common to environmental attributes exacerbate the confusion over these marketing terms. Environmental claims . . . pertain to characteristics of a product with which a consumer generally has little or no experience or comparative information. Consumers, therefore, cannot evaluate the credibility or value of such claims. . . . Finally, many terms used in environmental labeling are not part of everyday language and are often poorly understood."

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11. Similar additional comments also appear in the record at: ER 68-95 (Petition to FTC); ER 101-119 (Comments of API to FTC); ER 120-127 (Comments of Society of the Plastics Industry, Inc., to FTC); and SER 84-87 (letter from The Procter & Gamble Company to Minnesota Attorney General).

12. For example, some manufacturers include use of their own "spills" and "mill scrap" within the term, others only include mill scrap they buy from others, and others only consider "post consumer" waste to be within the term's meaning. *See, e.g.*, The Green Report, SER 32-33 and FTC Guides for the Use of Environmental Marketing Claims, SER 94-122, 115-119.

In addition to the need to halt the continuation of the deceptive advertising that resulted from the use of undefined terms in environmental advertising, the California Legislature was also aware that California is facing a tremendous solid waste problem, that the public is concerned about it and that the public wants to help become part of the solution--rather than only adding to the problem. By defining environmental terms to include minimal threshold standards, the legislature was not only able to ensure that manufacturers who so labeled their products would be making products which were more environmentally benign, but also that consumers would have the knowledge that buying products which carried the defined environmental terms would be a step toward helping to solve the solid waste problems California faced.

This being the marketplace world with which the California Legislature was faced when considering the bill which became §17508.5 (AB 3994), the author of the bill was able to state:

> "This measure is designed to address the increasing problem of false or misleading environmental claims made about certain consumer products. [¶] Specifically, the bill makes it unlawful for manufacturers and distributors of consumer products to represent that their products are 'ozone friendly,' 'biodegradable,' 'photodegradable,' 'recyclable' or 'recycled' unless the products meet standards specified in the bill. . . . [¶] Recent public opinion polls show that there has been a strong resurgence of environmental awareness on the part of the public. Consumers are increasingly interested in purchasing products which are beneficial to the environment. In reaction to this consumer preference, product manufacturers have begun to label and advertise thousands of products as

> environmentally friendly. Unfortunately, this has lead to widespread confusion on the part of the public as to which products are truly environmentally sound and which are merely being advertised as such to promote sales. AB 3994 will establish objective standards which will provide the public and law enforcement with the ability to determine which products are indeed not harmful to the environment." Letter of September 7, 1990 from Assemblyperson Byron Sher to Governor George Deukmejian.[13/]

See, also, for an explanation of what the legislature and various departments of California state government believed the purposes of AB 3994 were, the following: the Office of Senate Floor Analyses Report to the full Senate membership, LH 1; Enrolled Bill Report of the California Air Resources Board, LH 2; Enrolled Bill Report of the California Department of Finance under date of "8-24-90" wherein the Department changed the "opposition" position expressed in its "5-24-90" Report (ER 183-184), to a position of deferral to other State agencies, LH 3; Report of the California Department of Conservation, LH 6; letter of September 10, 1990, from Attorney General John K. Van de Kamp to Governor George Deukmejian, SER 88-89[14/]; and letter of January 10, 1991, from

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13. This letter is attached to Appellees' Californians Against Waste and the Environmental Defense Fund Motion for Judicial Notice filed August 31, 1993, as Legislative History ("LH") 5.

14. This letter states in part as follows: "In recent years we have seen an increase in questionable 'environmental' advertising with claims such as 'environmentally friendly,' 'biodegradable,' and 'recyclable' being utilized with virtually no scientific support. . . . [¶]Environmental claims are similar to the 'health' claims made for elixirs in the Old West. There was no scientific or medical basis for the claims, but there was also no basis for disproving them!

Assemblyperson Sher to Attorney General Daniel Lungren, ER 190[15].

Thus, it is clear that the legislative intent in adopting §17508.5 was to address the problems caused by deceptive environmental advertising, not by outlawing such advertising but by requiring that it be truthful and meaningful and that products which so advertise themselves were at least more environmentally benign than those that could not so advertise.

REASONS TO DENY THE WRIT

PETITIONERS MISCONSTRUE THE STATUTE, THE RECORD AND THE NINTH CIRCUIT'S DECISION

A. The Statute Makes No Distinction Between "For Profit" and "Not For Profit" Speakers Nor Does It Discriminate Based on Viewpoint

In their Petition, the petitioners seem to have given up their claim that §17508.5 is unconstitutional because it infringes upon their "non-commercial" speech and accepted

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Thus, the claims were made, and consumers relied upon those claims in making product choices without knowing of the total absence of credible evidence to support the claims. This kind of activity prevents consumers from making intelligent marketplace choices. Worse, this practice unfairly rewards businesses who are deceptively attempting to capitalize on the public's heightened awareness of the environmental consequences of their buying decisions. [¶]Enactment of AB 3994 would establish clear statutory standards for industry and consumers alike. . . ."

15. "The Attorney General and district attorneys enforce its [Section 17508.5] provisions just as they currently enforce other deceptive advertising statutes . . . . the intent of the bill was not to discourage environmental advertising, but to ensure more truthful environmental advertising . . . " ER 190.

the correct conclusion of both the Court of Appeals (Pet. App. 13a), and the district court that the statute only concerns "commercial speech," Pet. App. 44a. Of course, such a conclusion is compelled by the statutory language itself.

Seizing upon a statement made by Judge Noonan in his dissent (Pet. App. 32a), petitioners now seem to argue that the statute violates their First Amendment rights because it makes a distinction between "for profit" speakers and "not for profit" speakers. Petition at 11-12 and 25-27. The statute, of course, makes no such distinction. By its clear terms it pertains to "any person." Thus, it applies to any "non-profit" seller in exactly the same fashion as it applies to "for profit" sellers. When a "non-profit"--be it the Environmental Defense Fund, Green Peace, or Californians Against Waste--tries to sell consumer goods which it manufactures or distributes, it can no more mislead the public about the products' environmental attributes than can the members of petitioners' trade associations. The statute simply applies to all--"any person"--manufacturers and distributors of consumer goods who make environmental claims *about* their products.

This is certainly not the type of "viewpoint" discrimination this Court was talking about in *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992). There the concern was that in similar situations--for example, in debates advocating racial tolerance or intolerance--different speakers could not use the same words because of governmental favoritism toward one speaker (those in favor of racial tolerance) over another (those opposed to it).

For that reason, the Court found the St. Paul ordinance an unconstitutional restriction on free speech.[16/]

Petitioners incorrectly argue that the §17508.5 creates such a distinction between speakers. It clearly does not. No manufacturer or distributor speaker, regardless of his or her view on what is best for the environment and regardless of whether the speaker is "for profit" or "not for profit," can make one of the four environmental advertising attribute claims defined in §17508.5 about his or her consumer product unless the product being advertised meets the definition of the claim set forth in the statute. All speakers are treated equally. Further, all speakers are treated equally in the political debate over what is best for the environment. All speakers can say whatever they want, argue in favor of whatever position they want, using whatever words they want, including the words defined by §17508.5. The California Legislature did not engage in view-point discrimination when it adopted §17508.5 and

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16. This Court's discussion of the invalidity of a St. Paul ordinance which dealt not with commercial speech at all, but with a ban on the use of "fighting words" that insulted, or provoked violence, "on the basis of race, color, creed, religion or gender" shows clearly the petitioners' misreliance on this case.

> ". . . those arguing *in favor* of racial, color, etc. tolerance and equality . . . could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but [that speaker's opponent could not hold up a sign saying] that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.' St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." *R.A.V. v. City of St. Paul*, 112 S.Ct. at 2548 (brackets added).

Thus, it is clear that the petitioners's reliance on the last sentence quoted above (Petition at 26) is inapposite.

that is why the Court of Appeals ruled correctly when it held the test of constitutionality the statute must pass is the four-prong intermediate scrutiny test for commercial speech set forth by this Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980).

B. The Court of Appeals and the District Court Properly Ruled That Section 17508.5 Meets This Court's Tests for a Statute Which Affects Commercial Speech

1. The Ninth Circuit Correctly Ruled That the Harm Dealt With by Section 17508.5 Is Real

Continually following the test it set forth in *Central Hudson*, the Court has reiterated, as it recently did in *Florida Bar v. Went For It, Inc.*, No. 94-226 (decided June 21, 1995), that although commercial speech is protected, it enjoys "'a limited measure of protection, commensurate with its subordinated position in the scale of First Amendment values' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477 (1989), quoting *Ohralik v. Ohio State Bar Assn*, 436 U.S. 447, 456 (1978)." *Florida Bar*, slip op. at 5. The petitioners' protestations notwithstanding, the *Florida Bar* decision shows that these standards, as applied by the Court of Appeals and the district court in ruling that §17508.5 is valid, have not been changed by the Court. As previously stated by the Court:

> "Commercial speech, however, is 'linked inextricably' with the commercial arrangement it proposes, . . . so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. . . . For this reason, laws

> restricting commercial speech, unlike laws burdening other forms of protected expression, *need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.*" *Edenfield v. Fane*, 113 S.Ct. 1792, 1798 (1993) (Emphasis added.)

The petitioners attack on the decision below because of a claimed failure to discuss *Edenfield* and two other decisions of this Court--*City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993) and *Ibanez v. Florida Department of Business and Professional Regulation*, 114 S.Ct. 2084 (1994), which found various statutes violative of the First Amendment--is without merit. A court, of course, need not critique in its analysis all other cases which involve the area under review in order to reach the correct result. This Court, for instance, did not mention these cases in its decision in *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696 (1993), wherein it upheld against a First Amendment challenge a federal law which prohibited a radio station in one state from advertising a neighboring state's legal lottery. Not surprisingly, in attempting to attack the Court of Appeals's opinion herein, the petitioners fail to discuss *Edge*, which relied heavily on this Court's decision in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986), and which in turn was heavily relied on by the Court in its *Fox* decision. The Court of Appeals in its decision herein relied substantially on the Court's decisions in both *Fox* and *Posadas*.[17]

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17. It must also be pointed out that the Court of Appeals does discuss *Cincinnati* and *Edenfield* in reaching its conclusion that §17508.5 only effects commercial speech. Thus, the court was well aware of these cases, but for the reasons explained, *infra*, correctly did not think they compelled a different conclusion.

As pointed out *supra*, pages 2-16, a review of the record in this matter shows that unlike the situations in *Edenfield* and *Ibanez*, where the Court found there was nothing in the record to substantiate the licensing boards' conclusions that the prohibited practices caused anything more than "purely hypothetical harm," in this matter, as in the record the Court recently approved of in *Florida Bar*, there is much evidence of real harm. And as in *Florida Bar*, the petitioners herein at no time refute the record "save by the conclusory assertion that the rule lacked 'any factual basis.'" Slip op. at 10.[18] Thus, the Court of Appeals correctly stated: "Appellees and amici have cited numerous instances of advertisers making marketing claims containing misleading or inconsistent uses of the terms regulated by section 17508.5." Pet. App. 17a.

2. The Ninth Circuit Correctly Ruled That Section 17508.5 Advances the Governmental Interest

The Court of Appeals held that the Legislature sought:

> ". . . to guard against a direct, predictable and ongoing result of potentially specious claims or ecological puffery about products with minimal environmental attributes. This supposition is sufficiently reasonable and substantiated to support the district court's finding of an adequate fit . . . . In short, we find sound support for the California

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18. In fact, although petitioners continually argue that the harms the state recites are "purely speculative," at page 17, note 11 of their Petition, they state: "Petitioners have in the past recognized, and do so now, that the terms regulated by Section 17508.5 could be used in ways that are confusing or misleading to some consumers."

> Legislature's conclusion that ecological claims boost consumer demand for products that do not always measure up. Given this nexus between commercial representations and consumption, the standardization of terms used in commercial representations about a product's environmental attributes is directly related to California's undisputedly substantial interests in truthful environmental advertising and conservation." Pet. App. 17a-18a.

Where, as in the market situation which pre-dated the adoption of §17508.5, there was an explosion of environmental advertising with much attendant confusion and uncertainty over what different advertisers meant when they used the same terms, it was only proper for the legislature to bring some order out of chaos. As did the Court in *Central Hudson*, 447 U.S. at 569, in *Posadas*, 478 U.S. at 344, and in *Edge*, 113 S.Ct. at 2707, (and as the Court intimated recently in *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995), when it indicated that advertising "is an influential weapon" in telling consumers about a product's attributes), the Court of Appeals in this case recognized that the legislature could conclude that there is an immediate connection between advertising and demand for the item advertised, and thus the advertising could be regulated to prevent deception. Pet. App. 16a-18a.

As the courts below held, the record in this case shows that there is a direct link between environmental advertising and sales.[19/] Thus, §17508.5 provides the "immediate connection" required by *Central Hudson*, 447 U.S. at 569--"the link between the uniform definitions

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19. *See, e.g.*, Joint Stipulation of Facts ¶48, Pet. App. 87a; *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986); *Standard Oil of California v. FTC*, 557 F.2d 653 (9th Cir. 1978).

mandated by §17508.5 and the goal of ensuring that consumers understand the claimed environmental attributes of products is neither 'tenuous' nor 'speculative.'" Pet. App. 49a; *see, also*, Pet. App. 17a-18a. In sum, the statute directly furthers the governmental interest in ensuring that consumers are accurately informed about the claimed environmental attributes of products *before* they buy them.

The petitioners are wrong when they argue that their Petition should be granted because the Court's decisions in *Cincinnati*, 113 S.Ct. 1505 (1993), *Edenfield*, 113 S.Ct. 1792 (1993) and *Coors*, 115 S.Ct. 1585 (1995), require that a different result be reached than the result reached by the Court of Appeals. Unlike the situation in *Edenfield*, where the Court could find no real harm which the regulation was aimed at alleviating, in the matter *sub judice*, the record makes clear that the harms recited are real. The record contains ample evidence that adoption of definitions for use in advertisements of the four environmental terms advances the state's asserted interests in a direct and material way. The record shows that many of the petitioners themselves, some of their individual members, and other groups as well, called for the adoption of uniform definitions so that advertisers who wanted to engage in environmental advertising would know the "rules of the game." And finally, the record herein is full of evidence which validates the California Legislature's belief that adoption of definitions of the most abused environmental terms would reduce the amount of deceptive advertising which was then occurring.[20/]

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20. *Ibanez*, 114 S.Ct. 2084, also does not help the petitioners' argument, because there the Court time and again emphasizes that there is nothing in the record to support the need for the regulation which was the basis of the disciplinary action: "We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board

The *Cincinnati* case also is dissimilar from the matter herein. There, the Court noted that denying commercial papers the right to be distributed through newsracks would not advance the City's goal of promoting safety and esthetics because only 62 newsracks out of 1,500-2,000 would be removed. Thus, enforcement of the ordinance was "an impermissible means of responding to the city's admittedly legitimate interests." 113 S.Ct. 1514. The same, however, cannot be said of §17508.5 because it meets the test set forth in *Edenfield* in that the State has:

> "demonstrate[d] that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem." *Edenfield*, 113 S.Ct. at 1803.

Likewise, this Court's recent decision in *Coors* does not compel a different result. There the Court held that a ban on labeling alcohol strength on bottles of beer failed to advance the government's interest in preventing strength wars because "of the overall irrationality of the government's regulatory scheme." 115 S.Ct. at 1592. But what was the irrationality? "The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government's true aim is to suppress strength wars." *Id.* The Court's continued review of the Federal Alcohol Administration Act showed other aspects of the statute's internal inconsistencies leading the Court to conclude: ". . . the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve

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relies here." *Id.*, at 2091. The Court of Appeals herein correctly held that the record in support of §17508.5 does not suffer from this infirmity, *see*, *e.g.*, notes 3 and 4, *supra*.

that end [the government's interest is combatting strength wars]. . . . [because] other provisions of the same act directly undermine and counteract its effects." *Id.*, at 1593; brackets added.

Unlike the statute under review in *Coors*, §17508.5 does not suffer from the same infirmities: it deals with all commercial representations regarding a product's environmental attributes whether in advertisements or on labels. Thus, §17508.5 "directly and materially advances its aim"--it requires that environmental claims for consumer products, which use one of the four defined terms will be truthful and meaningful, advancing both California's consumer protection and environmental policy goals.

The legislature gave the four environmental terms meaning and the Court of Appeals correctly ruled that in doing so, §17508.5 effectively advances California's legitimate interests.

3. The Ninth Circuit Correctly Ruled That Section 17508.5 Is Sufficiently Tailored to Its Goal

The Court of Appeals also correctly ruled that §17508.5 is sufficiently tailored to achieve the dual legislative goals of consumer and environmental protection. It accomplishes the first by curtailing deceptive commercial advertising and, thus, protects both the buying public and the scrupulous advertiser of more environmentally benign products. Pet. App. 18a-21a. It accomplishes the second by allowing manufacturers who have made products with enhanced environmental attributes which meet the definitions of the statute to so advertise and legitimately capture the benefits of green labelling. It thus furthers the goals of promoting resource conservation and reducing the burden on brimming landfills. Pet. App. 21a-22a. And

finally, it accomplishes both goals by ensuring that manufacturers and distributors of more environmentally benign products will not have to compete against products which do not have the same environmental attributes, but seek to use the terms of environmental marketing anyway.

In reaching this conclusion, the Ninth Circuit not only correctly analyzed this Court's previous decisions regarding the standards to be applied in determining whether the "fit" between a statute and the legislature's goal is proper, but previewed the Court's recent decision in *Florida Bar*. There, as it had done in *Edge*, the Court restates the "fit" test by reference to *Fox*, indicating that "In *Fox*, we made clear that the 'least restrictive means' test has no role in the commercial speech context." *Florida Bar*, slip op. at 14.

The Court of Appeals correctly found the necessary fit between §17508.5 and the harms the legislature sought to correct, because the teaching of *Florida Bar, Edge*, and *Ohralik*, 436 U.S. at 462, is that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct." *Edge*, 113 S.Ct. at 2705. It seems that, among other reasons, because the regulation in question in the *Coors* case did not bear the proper relationship to the problem the government sought to correct, it was found to be improper.

Since, in *Florida Bar*, and previously in *Edge*, the Court returned to its decision in *Fox*, the petitioners are incorrect in complaining that the Court of Appeals herein was wrong when it relied in its analysis upon *Fox*. In *Florida Bar*, the Court interpreted the holding of *Fox* in the same manner as the Court of Appeals did:

> "'What our decisions require,' instead, 'is a "fit" between the legislature's ends and the means chosen

> to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Florida Bar*, slip op. at 14, quoting *Fox*, 492 U.S. at 480.

Thus, so long as the "fit" is "reasonable," the Court will "leave it to government decisionmakers to judge what measure of regulation may best be employed." *Fox*, at 480. The Court of Appeals here, as required by this Court in *Posadas*, 478 U.S. at 341, *Fox*, 492 U.S. at 480, *Edge*, and *Florida Bar* correctly held that §17508.5's manner of regulating the use of certain environmental terms in advertising more than adequately meets the "'fit' between the legislature's ends and the means chosen to accomplish those ends." *Florida Bar*, slip op. at 14.

And the Court in *Edge* reiterated that what it had said in *Fox* is the standard reviewing courts are to apply:

> "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgment." *Edge*, 113 S.Ct. at 2707.

As shown by this Court's most recent decision in *Florida Bar*, petitioners are also wrong when they claim the *Coors* decision requires a reversal of the Ninth Circuit's decision in this matter. Although in *Coors* the Court recognized the existence of ways less obtrusive than an outright ban on labelling to accomplish the government's goal and therefore found the necessary "fit" missing, it is almost always possible to find less obtrusive means than an outright *ban*. The *Florida Bar* decision at a minimum,

however, reiterates that the existence of other alternatives does not invalidate a legislative choice so long as the legislature's choice, even if it is not the single best choice, is a choice which is "in proportion to the interest served." Slip op. at 14. As the courts below ruled, §17508.5 clearly meets this test.

Section 17508.5 is not a statute which bans speech. Rather it requires that when certain terms are used in advertising the environmental benefits of a consumer product, the consumer product meet minimal standards. This ensures that consumers who want to purchase, or who think they are purchasing, products which either have an environmental benefit or are at least more environmentally benign than other products, will not be fooled. The statute, by defining only the terms of environmental marketing which the record shows caused the public the most confusion and potential for harm, sought to leave other forms of expression open to advertisers. By enacting §17508.5, the legislature sought to prevent advertisements for products which, while they may be literally true, do not provide a meaningful environmental benefit. Thus, manufacturers who have spent money to develop more environmentally benign products, and the public, are protected from damage by those who would improperly use the "buzz" words of environmental marketing. Section 17508.5 merely requires that products which make an environmental claim, provide an environmental benefit. It has done so in a manner which furthers the state's goals of consumer and environmental protection while at the same time not placing a burden on speech which is more extensive than necessary.

The Court of Appeals further reviewed the "alternatives" suggested by petitioners (Petition 22-24) and correctly concluded that the "case-by-case prosecution" approach (which petitioners had previously opposed; Pet.

App. 23a) or adoption of a statute mandating qualifying or explanatory language are not legitimate alternatives because they neither accomplish the legislature's goals nor are they less restrictive or more precise. Pet. App. 23a-24a. For instance, use of California's general false advertising laws to challenge spurious environmental claims

> "require reference to vague, unspecified standards . . . as opposed to section 17508.5's numerically exact thresholds, to ascertain liability. These alternative statutes are *less* precise and, as the district court noted, potentially more inhibiting of truthful environmental representations. *Lungren*, 809 F.Supp. at 759. More over, these statutes promote a narrower range of state interests than section 17508.5, insofar as they fail to create the same incentives for environmentally substandard firms to improve the ecological attributes of their products rather than merely harmonize their claims with production and disposal realities." Court of Appeal decision, Pet. App. 23a-24a.

The Court of Appeals concludes its analysis of alternatives to §17508.5 by stating:

> "Here, as discussed above, the linkage between the asserted governmental interest and advertising was equally close, and the restriction less sweeping than that sustained by the Court in *Posadas*. Here, an alternative approach requiring additional speech to illuminate environmental claims was equally close at hand. Yet as the district court observed, these and other potential alternatives--including prescreening, format and content guidelines and added detail--were not clearly less burdensome than adherence to uniform definitions. *Lungren*, 809 F.Supp. at 759. In addition, . . . it is not apparent that use of the

regulated terms with qualifiers would advance California's second asserted interest, environmental protection." Pet. App 24a.

The Ninth Circuit based its conclusion on a proper analysis of this Court's previous decisions and correctly held that the scope of §17508.5 was narrowly tailored to advance *both* of California's interests: consumer protection from deceptive advertisements and environmental protection by ensuring that more environmentally benign products could effectively advertise and "capture the benefits of green labelling." Pet. App. 21a-22a. Thus, §17508.5 is a "reasonable fit" to meet the legislative goals, meets each *Central Hudson* test, is constitutional and no reason exists for this Court to review the Ninth Circuit's decision.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Dated: July 7, 1995

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APPENDIX

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§ 17508.5. Environmental representations relating to consumer goods

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric *ozone* is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product * * * will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with

a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.45 of the Public Resources Code.[1]

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation. (Added by Stats.1990, c. 1413 (A.B.3994), § 1. Amended by Stats.1991, c. 1091 (A.B.1487), § 11.)

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1. The portion of the statute defining "recyclable" was held to be unconstitutionally vague by the district court. (57a-59a) The State has not appealed that ruling.

February 1993

EPA 741R-92-003

United States
Environmental Protection
Agency

Office of Pollution Prevention
and Toxics
Washington, D.C. 20460

EPA

EVALUATION OF ENVIRONMENTAL MARKETING TERMS IN THE UNITED STATES

- 4Ra -

EVALUATION OF ENVIRONMENTAL MARKETING TERMS IN THE UNITED STATES

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EXECUTIVE SUMMARY

Since 1989, environmental marketing has emerged as an important issue for consumers, marketers, regulators, and policy makers. Many American consumers, not only the most environmentally conscious, have sought to lessen the environmental impacts of personal purchasing decisions by buying and using products perceived to be less harmful to the environment. Marketers have responded to consumer demand by increasing both environmental marketing claims and new or redesigned "green" consumer products. Policy makers have seen environmental marketing as a means to promote environmental policy goals through market-based incentives.

. . .

This study is a comprehensive examination of the use of environmental marketing terms in the United States as of mid-1992. Topics discussed in the report include: (a) issues involved in the use of environmental marketing terms; (b) consumer understanding of these terms; (c) trends in the use of environmental marketing terms in consumer product labeling and advertising; (d) cases where environmental marketing claims have been avoided or discontinued; and (e) proposed and existing definitions of environmental marketing terms.

This report was prepared in response to a call for federal action by many groups involved in environmental marketing, and is designed to serve two main purposes. For state and federal policy makers seeking to promulgate guidelines or regulations governing environmental marketing terms, it provides an analytical foundation on which to base policy decisions. For those generally interested in environmental marketing, it serves as a comprehensive source of information about the major

issues involved. It does not advocate a particular position or course of action. Many of the trends discussed in this report can serve as a baseline against which comparisons can be made in the future. Much of the research was completed prior to the Federal Trade Commission's issuance of guidelines for environmental marketing. Consequently, while the guidelines are included in this report, no data yet exist with which to measure their effects on the marketplace.

Environmental Marketing Issues[1]

Environmental marketing differs from other forms of advertising in two important ways. First, consumers who buy goods perceived to be less environmentally harmful base their purchasing decisions not only on inherent product characteristics (such as price and apparent quality), but also because they feel that they are "doing good," either by minimizing their own environmental impacts or by promoting environmentally beneficial activities (e.g., closing the recycling loop by buying products with substantial recycled content). Second, environmental marketing provides incentives for manufacturers to make significant environmental improvements by providing a competitive advantage to reduce environmental impacts of product manufacture, use, reuse, and eventual disposal. However, the rapid rise in the use of poorly-defined or ambiguous terms used in environmental marketing has created several marketplace disruptions. These disruptions include consumer confusion, legal and other actions against marketers for deceptive advertising, and attempts by

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1. The term environmental marketing is used in this paper to mean the voluntary use of environmental claims by marketers. In this context, it does not include third-party certification programs or mandatory negative labeling, such as health hazard warning labels.

several private organizations and government agencies to create standardized definitions and guidelines for the use of the terms that conflict with the FTC guidelines.

Several factors common to environmental attributes exacerbate the confusion over these marketing terms. Environmental claims, such as *ozone-friendly* or *source-reduced*, pertain to characteristics of a product with which a consumer generally has little or no experience or comparative information. Consumers, therefore, cannot evaluate the credibility or value of such claims. In addition, environmental labels often pertain to circumstances over which a marketer has little or no control. For example, the recyclability of a package is thought by many to be dependent upon the availability of the appropriate recycling infrastructure. By promoting a product as *recyclable*, marketers are making a claim over which they have little or no control because they do not provide consumer access to the appropriate recycling infrastructure. Finally, many terms used in environmental labeling are not part of everyday language and are often poorly understood. A lack of common understanding of terms has led to the misperception that environmental claims imply that a product is "good for the environment," even though virtually all consumer products are associated with some adverse environmental impacts. Often possessing a limited understanding of the scientific and policy issues and vocabulary involved, consumers are exceptionally powerless when evaluating environmental claims and are arguably most in need of nationwide, uniform guidance.

Because environmental marketing relates to, and benefits from, consumers' desire to minimize their impacts on the environment, environmental advertising claims must be more than simply truthful in the information they relate. To serve as a policy tool, the claims themselves must

reflect real environmental benefits or policy goals recognized by scientists, policy makers, manufacturers, and society. While regulation of environmental marketing terms alone may not increase the purchase of green products, well-conceived definitions and guidance could ensure that the environmental marketing claims made that influence consumer purchasing decisions are truthful, standardized across products, and non-trivial.

Consumer Understanding and Response

After more than two years of heavy exposure to environmental marketing, recent surveys indicate that American consumers are somewhat skeptical and would support governmental regulation of environmental advertising, but are still generally believing of and responding to environmental marketing claims. However, studies also show that (a) many consumers do not understand the specific environmental labeling terms with which they are confronted, and (b) many consumers often do not act on their own assertion that they would preferentially purchase products that are less damaging to the environment.

Surveys examining consumer awareness and understanding of environmental marketing terms indicate that comprehension varies among terms and for the most part is quite low. The terms most commonly used by marketers, such as *recycled* and *biodegradable*, were also the most widely understood by survey respondents. This suggests that consumers have the capacity to learn about the importance of product attributes if exposed to such information (labeling information in conjunction with other educational efforts) over time.

Evidence exists that a significant number of consumers are skeptical or unsure about the veracity of environmental marketing claims. Although they indicate a willingness to selectively purchase or to pay more for products with real environmental benefits, many consumers do not believe that marketers' environmental marketing claims can be trusted. What consumers appear to be lacking is both an adequate understanding of the meanings of environmental claims, and a means to assessing their veracity and significance. Consumer skepticism might be lessened by a credible source of standardized definitions for environmental terms that consumers knew to be true and non-trivial.

Through their purchasing decisions, consumers give producers marketplace feedback about their personal environmental concerns, thereby creating incentives to make real environmental improvements. Consumer perception and their resulting demand helps to drive the development and improvement of a product's environmental attributes. By providing a common language of terms, highly specific federal guidelines would (a) allow consumers to understand what products offer them, and to provide informed feedback (through their purchasing decisions) to producers; and (b) allow marketers to advertise environmental qualities in ways that are clear to consumers, consumer advocates, and regulators.

Certain other nationwide actions, such as consistent review of claims, enforcement actions where warranted, development of a third-party eco-labeling program, negative labeling of products with hazardous constituents, or other forms of extensive consumer education, have been suggested by some as potential ways to increase consumer awareness of the environmental consequences of their purchasing decisions.

Use of Environmental Marketing Terms

Judging by advertising and trade press coverage, environmental marketing appears to be an important trend to marketers. However, there have been few studies to quantify environmental marketing activity. One measure of activity in this field is the number and type of environmental claims being made for non-durable consumer packaged goods. Research using a database of new grocery store product introductions indicates that the use of environmental marketing claims has indeed increased rapidly in recent years. In 1989, 5.9 percent of new products had environmental claims. This increased to 10.1 percent in 1990 and 12.3 percent in 1991. The first six months of 1992 has shown a slight decline in most types of claims, falling to 11.4 percent of new product introductions.